

**PART 229—AUTHORIZATION FOR
COMMERCIAL FISHERIES UNDER
THE MARINE MAMMAL PROTECTION
ACT OF 1972**

Subpart A—General Provisions

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AUTHORITY: 16 U.S.C. 1361 *et seq.*

SOURCE: 60 FR 45100, Aug. 30, 1995, unless otherwise noted.

Subpart A—General Provisions

§ 229.1 Purpose and scope.

(a) The regulations in this part implement sections 101(a)(5)(E) and 118 of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1371(a)(5)(E) and 1387) that provide for exceptions for the taking of marine mammals incidental to certain commercial fishing operations from the Act's general moratorium on the taking of marine mammals.

(b) Section 118 of the Act, rather than sections 103 and 104, governs the incidental taking of marine mammals in the course of commercial fishing operations by persons using vessels of the United States, other than vessels fishing for yellowfin tuna in the eastern tropical Pacific Ocean purse seine fishery, and vessels that have valid fishing

permits issued in accordance with section 204(b) of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1824(b)).

(c) The regulations of Subpart B also govern the incidental taking by commercial fishers of marine mammals from species or stocks designated under the Act as depleted on the basis of their listing as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(d) The regulations of this part do not apply to the incidental taking of California sea otters or to Northwest treaty Indian tribal members exercising treaty fishing rights.

(e) Authorizations under subpart A of this part are exemptions only from the taking prohibitions under the Act and not those under the Endangered Species Act of 1973. To be exempt from the taking prohibitions under the Endangered Species Act, specific authorization under subpart B of this part is required.

(f) Authorizations under this part do not apply to the intentional lethal taking of marine mammals in the course of commercial fishing operations.

(g) The purposes of the regulations in this part are to: (1) Reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations below the potential biological removal level for a particular stock, and

(2) Reduce the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate by the statutory deadline of April 30, 2001.

§ 229.2 Definitions.

In addition to the definitions contained in the Act and § 216.3 of this chapter, and unless the context otherwise requires, in this part 229:

Act or *MMPA* means the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*).

Authorization Certificate means a document issued by the Assistant Administrator, or designee, under the authority of section 118 of the Act that authorizes the incidental, but not intentional, taking of marine mammals in Category I or II fisheries.

Category I fishery means a commercial fishery determined by the Assistant Administrator to have frequent incidental mortality and serious injury of marine mammals. A commercial fishery that frequently causes mortality or serious injury of marine mammals is one that is by itself responsible for the annual removal of 50 percent or more of any stock's potential biological removal level.

Category II fishery means a commercial fishery determined by the Assistant Administrator to have occasional incidental mortality and serious injury of marine mammals. A commercial fishery that occasionally causes mortality or serious injury of marine mammals is one that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent of any marine mammal stock's potential biological removal level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the taking is "occasional" by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the Assistant Administrator. Eligible commercial fisheries not specifically identified in the list of fisheries are deemed to be Category II fisheries until the next list of fisheries is published.

Category III fishery means a commercial fishery determined by the Assistant Administrator to have a remote likelihood of, or no known incidental mortality and serious injury of marine mammals. A commercial fishery that

has a remote likelihood of causing incidental mortality and serious injury of marine mammals is one that collectively with other fisheries is responsible for the annual removal of:

(1) Ten percent or less of any marine mammal stock's potential biological removal level, or

(2) More than 10 percent of any marine mammal stock's potential biological removal level, yet that fishery by itself is responsible for the annual removal of 1 percent or less of that stock's potential biological removal level. In the absence of reliable information indicating the frequency of incidental mortality and serious injury of marine mammals by a commercial fishery, the Assistant Administrator will determine whether the taking is "remote" by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area or at the discretion of the Administrator.

Commercial fishing operation means the catching, taking, or harvesting of fish from the marine environment (or other areas where marine mammals occur) that results in the sale or barter of all or part of the fish harvested. The term includes licensed commercial passenger fishing vessel (as defined in §216.3 of this chapter) activities and aquaculture activities.

Depleted species means any species or population that has been designated as depleted under the Act and is listed in §216.15 of this chapter or part 18, subpart E of this title, or any endangered or threatened species of marine mammal.

Fisher means the vessel owner or operator or owner or operator of gear in a nonvessel fishery.

Fishery has the same meaning as in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

Fishing trip means any time spent away from port actively engaged in commercial fishing operations. The end of a fishing trip will be the time of a

fishing vessel's return to port or the return of a fisher from tending gear in a nonvessel fishery.

Fishing vessel or *vessel* means any vessel, boat, ship, or other craft that is used for, equipped to be used for, or of a type normally used for, fishing.

Incidental, but not intentional, take means the non-intentional or accidental taking of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action.

Incidental mortality means the non-intentional or accidental death of a marine mammal that results from, but is not the purpose of, carrying out an otherwise lawful action.

Injury means a wound or other physical harm. Signs of injury to a marine mammal include, but are not limited to, visible blood flow, loss of or damage to an appendage or jaw, inability to use one or more appendages, asymmetry in the shape of the body or body position, noticeable swelling or hemorrhage, laceration, puncture or rupture of eyeball, listless appearance or inability to defend itself, inability to swim or dive upon release from fishing gear, or signs of equilibrium imbalance. Any animal that ingests fishing gear, or any animal that is released with fishing gear entangling, trailing or perforating any part of the body will be considered injured regardless of the absence of any wound or other evidence of an injury.

Interaction means coming in contact with fishing gear or catch. An interaction may be characterized by a marine mammal entangled, hooked, or otherwise trapped in fishing gear, regardless of whether injury or mortality occurs, or situations where marine mammals are preying on catch. Catch means fish or shellfish that has been hooked, entangled, snagged, trapped or otherwise captured by commercial fishing gear.

List of Fisheries means the most recent final list of commercial fisheries published in the FEDERAL REGISTER by the Assistant Administrator, categorized according to the likelihood of incidental mortality and serious injury of marine mammals during commercial fishing operations.

Minimum population estimate means an estimate of the number of animals in a stock that:

(1) Is based on the best available scientific information on abundance, incorporating the precision and variability associated with such information; and

(2) Provides reasonable assurance that the stock size is equal to or greater than the estimate.

Negligible impact has the same meaning as in §228.3 of this chapter.

Net productivity rate means the annual per capita rate of increase in a stock resulting from additions due to reproduction, less losses due to mortality.

Nonvessel fishery means a commercial fishing operation that uses fixed or other gear without a vessel, such as gear used in set gillnet, trap, beach seine, weir, ranch, and pen fisheries.

NMFS means the National Marine Fisheries Service.

Observer means an individual authorized by NMFS, or a designated contractor, to record information on marine mammal interactions, fishing operations, marine mammal life history information, and other scientific data, and collect biological specimens during commercial fishing activities.

Potential biological removal level means the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. The potential biological removal level is the product of the following factors:

(1) The minimum population estimate of the stock;

(2) One-half the maximum theoretical or estimated net productivity rate of the stock at a small population size; and

(3) A recovery factor of between 0.1 and 1.0.

Regional Fishery Management Council means a regional fishery management council established under section 302 of the Magnuson Fishery Conservation and Management Act.

Serious injury means any injury that will likely result in mortality.

Strategic stock means a marine mammal stock:

(1) For which the level of direct human-caused mortality exceeds the potential biological removal level;

(2) Which, based on the best available scientific information, is declining and is likely to be listed as a threatened species under the Endangered Species Act of 1973 within the foreseeable future;

(3) Which is listed as a threatened species or endangered species under the Endangered Species Act of 1973; or

(4) Which is designated as depleted under the Marine Mammal Protection Act of 1972, as amended.

Take Reduction Plan means a plan developed to reduce the incidental mortality and serious injury of marine mammals during commercial fishing operations in accordance with section 118 of the Marine Mammal Protection Act of 1972, as amended.

Take Reduction Team means a team established to recommend methods of reducing the incidental mortality and serious injury of marine mammals due to commercial fishing operations, in accordance with section 118 of the Marine Mammal Protection Act of 1972, as amended.

Vessel owner or operator means the owner or operator of:

(1) A fishing vessel that engages in a commercial fishing operation; or

(2) Fixed or other commercial fishing gear that is used in a nonvessel fishery.

Vessel of the United States has the same meaning as in section 3 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1802).

§ 229.3 Prohibitions.

(a) It is prohibited to take any marine mammal incidental to commercial fishing operations except as otherwise provided in part 216 of this chapter or in this part 229.

(b) It is prohibited to assault, harm, harass (including sexually harass), oppose, impede, intimidate, impair, or in any way influence or interfere with an observer, or attempt the same. This prohibition includes, but is not limited to, any action that interferes with an observer's responsibilities, or that creates an intimidating, hostile, or offensive environment.

(c) It is prohibited to provide false information when registering for an Au-

thorization Certificate, applying for renewal of the Authorization Certificate, reporting the taking of any marine mammal, or providing information to any observer.

(d) It is prohibited to tamper with or destroy observer equipment in any way.

(e) It is prohibited to intentionally lethally take any marine mammal in the course of commercial fishing operations unless imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported in accordance with the requirements of § 229.6.

(f) It is prohibited to violate any regulation in this part or any provision of section 118 of the Act.

§ 229.4 Requirements for Category I and II fisheries.

(a) *General.* For a vessel owner or crew members to lawfully incidentally take marine mammals in the course of commercial fishing operations in a Category I or II fishery, the owner or authorized representative of a fishing vessel or nonvessel fishing gear must annually register for and receive an Authorization Certificate. The granting and administration of authorizations under this part shall be integrated and coordinated with existing fishery license, registration, or permit systems and related programs, wherever possible. These programs may include, but are not limited to, state or interjurisdictional fisheries programs. If the administration of authorizations is integrated into an existing program, NMFS will publish a notice in the FEDERAL REGISTER of where to register, and efforts will be made to contact affected fishers via other appropriate means of notification.

(b) *Registration.* Owners of vessels or, for nonvessel fisheries, gear, must register for and receive an Authorization Certificate. To register, owners must submit the following information, using a format specified by NMFS:

(1) Name, address, and phone number of owner;

(2) Name, address, and phone number of operator, if different from owner, unless the name of the operator is not known or has not been established at the time the registration is submitted;